

FCC MAIL SECTION

Federal Communications Commission

DA 99-498

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DISPATCHED BY
Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 99-74
Table of Allotments,) RM-9367
FM Broadcast Stations.)
(Bay Springs and Ellisville, Mississippi))

NOTICE OF PROPOSED RULE MAKING

Adopted: March 3, 1999

Released: March 12, 1999

Comment Date: May 3, 1999

Reply Comment Date: May 18, 1999

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Blakeney Communications, Inc. ("petitioner"), licensee of Station WKZW(FM),¹ Bay Springs, Mississippi, requesting the reallocation of Channel 232C2 from Bay Springs to Ellisville, Mississippi, as the latter community's first locally competitive aural transmission service, and modification of its authorization accordingly. Petitioner stated an intention to apply for Channel 232C2 if it is reallocated to Ellisville, as requested.

2. Petitioner's request is filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.² Petitioner advises that the requested reallocation of Channel 232C2 to Ellisville is mutually exclusive with its existing authorization at Bay Springs. The distance between Bay Springs and Ellisville is 37.5 kilometers (23 miles) from the licensed site for Station WKZW(FM) and 22.8 kilometers (14 miles) from its construction permit site, whereas a distance of 190 kilometers (118 miles) is required in this instance.³

¹Petitioner advises that it has a license for Channel 232C2 at Bay Springs, Mississippi, at coordinates 31-46-05 NL and 89-10-12 WL (File No. BLH-980427KE), as well as a construction permit at coordinates 31-41-28 NL and 89-17-45 WL (File No. BPH-980217ID).

²See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990).

³Coordinates at the site specified by the petitioner for a transmitter site at Ellisville are 31-33-25 NL and 89-28-42 WL.

3. In support of its proposal, petitioner advises that adoption of its proposal would result in a preferential arrangement of allotments consistent with the Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).⁴ In accordance with the allotment priorities, petitioner advises that no white or grey area is involved in either the area which would gain service or the area which would lose service as a result of the proposed reallocation. As both communities presently have a local aural transmission service, petitioner states that a comparison of the communities must be undertaken pursuant to allotment priority four. In this regard, petitioner states that the reallocation proposal would provide the larger community of Ellisville (population 3,634),⁵ the county seat of Jones County, with its first competitive local aural transmission service. By comparison the smaller community of Bay Springs (population 1,729), the county seat of Jasper County, would not be left unserved, as Station WIZK(AM) is also licensed to that community.

4. As to signal population coverage, petitioner states that as presently licensed, Station WKZW(FM) provides service to 180,721 people within its 1 mV/m contour. The facilities authorized in the outstanding construction permit for Station WKZW(FM) at Bay Springs would provide service to an area of 8,489 square kilometers containing a population of 214,180 people. By way of contrast, petitioner asserts that operation from its intended site at Ellisville would serve 233,529 people, representing a net increase of 52,808 persons as compared to Station WKZW(FM)'s presently operating facilities. Additionally, petitioner advises that 19,349 persons would gain a new service as a result of the reallocation when compared to the facilities authorized in Station WKZW(FM)'s unbuilt construction permit facilities at Bay Springs. Further, petitioner reports that at least five fulltime aural services will remain available to the loss area. Conversely, petitioner remarks that there are less than five existing aural services available to the gain area. In this regard, petitioner advises that the reallocation will provide a fifth aural service to an underserved area encompassing four square kilometers containing 212 persons.

5. In further support of the reallocation proposal, petitioner advises that Ellisville is an incorporated community containing a vibrant business center. Also, Ellisville represents the First Judicial District of Jones County and has two of the leading employers in the county. With respect to the latter, petitioner advises that the Ellisville State School employs 1,331 persons. Petitioner also advises that Jones Junior College with 375 employees, was recently chosen by a worldwide leader in networking for the internet as the site for its regional networking academy. Further, petitioner advises that Ellisville is also a banking center and the base of numerous businesses and manufacturing concerns, which, together with the county government and schools systems, attract employees throughout the area to work in the community. In addition, petitioner advises that many workers commute from the larger community of Laurel (pop. 18,827) to Ellisville to work. As a result, numerous service businesses have evolved in Ellisville to serve the needs of both residents and commuters. Specifically, petitioner asserts that thirteen

⁴The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters (co-equal weight is given to priorities (2) and (3)).

⁵Population figures reported herein were taken from the 1990 U.S. Census.

restaurants and fourteen churches are located in Ellisville. Additionally, among the businesses located in Ellisville are hardware stores, garages, florists, insurance agencies, medical and dental clinics. Petitioner states that Ellisville contains its own fire and police departments, and water works.

6. Moreover, petitioner asserts that a comparison of the two counties in which the communities of Bay Springs and Ellisville are located illustrates the greater need for service in Ellisville. In this regard, petitioner advises that Ellisville is the county seat of Jones County, while Bay Springs is located in Jasper County. The estimated population of 63,200 residents of Jones County greatly exceeds that of Jasper County's 17,400 residents. Further, Jones County contains 22,900 households whereas Jasper County has 6,200 households. Moreover, petitioner claims that a comparison of the median incomes for Jones County (\$22,900) and Jasper County (\$19,763) reflects that Jones County is the more prosperous, thriving county. As to the economic activities in the two counties, petitioner reports that Jones County contains eighty-one manufacturing businesses which employ 4,800 people. Jasper County, on the other hand, has twenty-five manufacturing establishments employing 600 people. Further, in 1994, Jones County generated wholesale trade amounting to \$218,006,000 and general merchandise sales amounting to \$86,512,000. During the same reporting period, Jasper County had wholesale trade amounting to \$41,231,000 and total general merchandise sales amounting to \$1,606,000.⁶ Petitioner asserts that the greater level of economic activity in Jones County demonstrates that it contains the more vibrant and flourishing communities and demonstrates the need for a first competitive local transmission service in Ellisville.

7. Additionally, petitioner advises that while Ellisville is not located within any urbanized area, the reallocation proposal would result in Station WKZW(FM)'s intended operation placing a city grade (70 dBu) signal over more than 50% of Hattiesburg, Mississippi, an urbanized area, as defined by the 1990 U.S. Census.⁷ However, petitioner asserts that Ellisville is a separate, distinct community from Hattiesburg. In further support, petitioner reports that Ellisville is in a county separate from any included in the Hattiesburg Urbanized Area. In that regard, petitioner advises that the urbanized area covers Lamar and Forrest Counties, whereas Ellisville is located in Jones County. Citing Faye and Richard Tuck, 3 FCC Rcd 5374 (1988), RKO General (KFRC), 5 FCC Rcd 3222 (1990), and Greenfield and Del Rey Oaks, California, 11 FCC Rcd 12681 (1996), petitioner advises that the Commission has established eight criteria to determine whether a community should be considered independent of an urbanized area.⁸

⁶Petitioner indicates that the cited statistical data was taken from the Rand McNally Commercial Atlas and Marketing Guide at 369.

⁷According to our engineering studies, proposed Channel 232C2at Ellisville would place a 70 dBu signal over 65.9% of the Hattiesburg, Mississippi, urbanized area.

⁸Those criteria are: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers
(continued...)

8. Petitioner contends that at least seven of those eight factors are present in this case. First, it remarks that Ellisville contains governmental agencies, schools and business entities which are among the largest in Jones County. Therefore, petitioner advises that Ellisville attracts workers from other communities and, therefore, it is not primarily dependent upon Hattiesburg for its employment base. Secondly, petitioner advises that Ellisville presently has one local media outlet. The nearest daily newspaper is published in Laurel, Mississippi. Therefore, petitioner claims that Ellisville needs a second local aural service to provide a diversity of viewpoints in local coverage. As Ellisville contains its own mayor and aldermen, numerous businesses, churches and civic organizations, petitioner believes those factors demonstrate that the local leaders perceive Ellisville as its own autonomous community, separate from any larger urbanized area. Further, petitioner advises that Ellisville is in separate Congressional, Chancery Court, Circuit Court and Junior College districts from Hattiesburg. Moreover, petitioner states that Ellisville does not share state senators or representatives with the Hattiesburg Urbanized Area.

9. As to other indicators of independent status, petitioner advises that Ellisville has its own zip code and telephone exchange. Although Ellisville is included in the Bell South Pine Belt Area telephone directory with Hattiesburg and Laurel, petitioner advises that the directory contains a separate white pages section for Ellisville. Additionally, petitioner reports that Dixie Directory publishes a separate telephone directory for Ellisville and Jones County. Petitioner reiterates that Ellisville has a host of business establishments, health facilities, religious affiliations, governmental agencies and manufacturing concerns and is the second largest employer in Jones County. Further, petitioner contends that Ellisville does not rely upon Hattiesburg for basic governmental services but rather has its own police and fire departments, water works, and is the seat of the First Judicial District of Jones County.

10. We solicit comment on the petitioner's proposal. The issue in this case is whether to reallocate Channel 232C2 and to change the community of license for Station WKZW(FM) from Bay Springs to Ellisville. In order to make this determination, we must compare the existing and proposed arrangement of allotments, using the FM allotment priorities previously referenced. As the petitioner has correctly pointed out, neither the existing nor proposed arrangement of allotments would trigger allotment priorities (1) or (2) because there are no areas that would receive a first or second aural reception service. Likewise, since each community already has at least one aural transmission service in addition to Station WKZW(FM), neither proposal would trigger priority (3), a first local transmission service. Rather, the case must be decided under

⁸(...continued)

the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools and libraries.

priority (4), other public interest matters. Under this priority, the issue is whether the smaller community of Bay Springs (pop. 1,729) or the larger community of Ellisville (pop. 3,634) should have a first competitive aural transmission service. Given the larger population of Ellisville and the greater amount of economic activity there, it may have a greater need for a competitive aural transmission service than Bay Springs. However, balanced against that argument is the fact that the reallocation of Station WKZW(FM) to Ellisville would leave Bay Springs with a daytime-only AM station, depriving the population of Bay Springs of its only local nighttime transmission service, which is another important consideration under priority (4). While we have permitted stations to change their communities of license and leave a daytime-only AM station in their former community, this has generally occurred where the proposed arrangement of allotments triggered priority (3), a first local transmission service in the new community.⁹ Further, while the petitioner has shown that the reallocation would result in 212 people having a fifth reception service, we solicit comment on whether this amount is *de minimis*¹⁰ as compared to the total service area and what the impact of this factor should be overall in this case. Finally, with respect to the petitioner's Tuck showing, we seek additional information on two of the factors. Although the petitioner has indicated that numerous people from other communities work in Ellisville, it has not provided information regarding the number of Ellisville residents that may work in the Hattiesburg Urbanized Area as opposed to Ellisville. Also, the petitioner has alleged that community leaders perceive Ellisville to be separate from the larger metropolitan area but has not submitted any letters from community leaders or residents.

11. Channel 232C2 can be allotted to Ellisville consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules utilizing the petitioner's intended transmitter site located 26.9 kilometers (16.7 miles) west of the community at coordinates 31-33-25 NL and 89-28-42 WL.

12. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Bay Springs, Mississippi	232C2	- -
Ellisville, Mississippi	273C2	232C2, 273C2

⁹See, e.g., Chattahoochee, Florida, 10 FCC Rcd 10352, 10355 (Allocations Branch 1995) (retention of only local night-time transmission service does not outweigh a change of community proposal triggering a first local service under priority (3)).

¹⁰See Seabrook, Texas, 10 FCC Rcd 9360, 9361-62 (Comm. 1995) (second aural reception service to 455 persons is *de minimis* compared to the total number of persons in a station's proposed gain area and did not warrant a preference under priority (2) over a competing upgrade proposal).

13. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

14. Interested parties may file comments on or before May 3, 1999, and reply comments on or before May 18, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the Secretary, 445 Twelfth Street, S.W.; TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Frank R. Jazzo, Esq.
Anne Goodwin Crump, Esq.
Fletcher, Heald & Hildreth, P.L.C.
1300 North 17th Street
Eleventh Floor
Arlington, VA 22209

15. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b) and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

16. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement.

Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Center (Room 239), at its headquarters, 1919 M Street, N.W., Washington, D.C.